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In The

Supreme Court of the United States

October Term, 1991

NEWPORT LIMITED,
A PARTNERSHIP IN COMMENDAM,

Petitioner,
versus

SEARS, ROEBUCK AND CO.,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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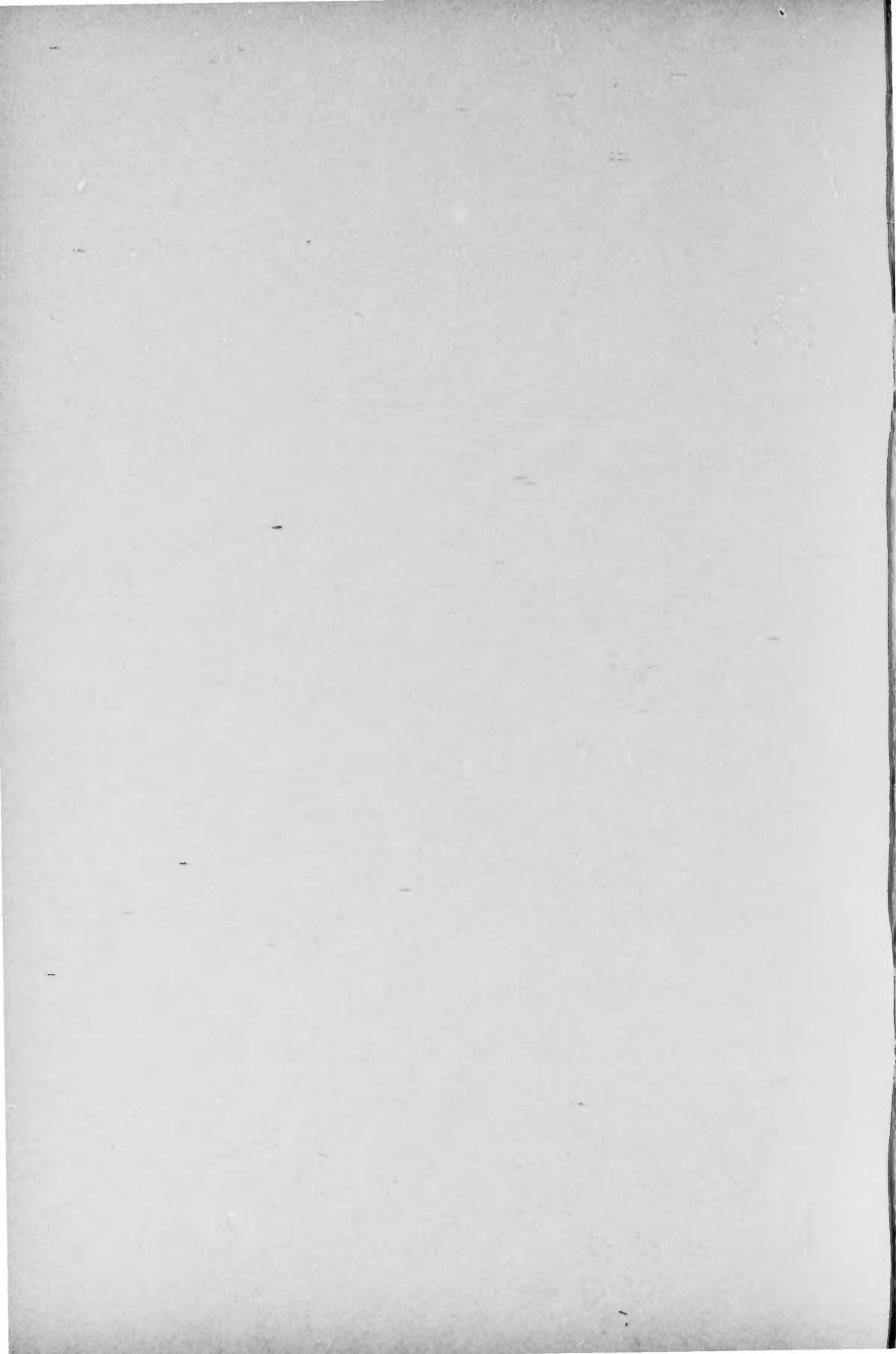


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
A. There Is a Conflict Among the Circuits	1
B. Novel Issues of State Law Exist and Comity Requires that State Courts Adjudicate Those Issues	5
C. Newport's Decision to Proceed in State Court Is Entitled to Deference	7
D. Sears Mischaracterizes the State Court Discovery	8
E. The Duration of Federal Jurisdiction Is Not Significant	9
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Berg v. First State Ins. Co.</i> , 915 F.2d 460 (9th Cir. 1990).....	2
<i>Brill v. Catfish Shaks of America, Inc.</i> , 727 F. Supp. 1035 (E.D. La. 1989).....	6, 7
<i>Brown v. Knox</i> , 547 F.2d 900 (5th Cir.), cert. denied, 432 U.S. 906 (1977).....	4
<i>Carden v. Arkoma Associates</i> , 494 U.S. 185 (1990)	7, 9
<i>Caserta v. Village of Dickinson</i> , 672 F.2d 431 (5th Cir. 1982).....	4
<i>Cooley v. Pennsylvania Housing Finance Agency</i> , 830 F.2d 469 (3d Cir. 1987).....	3
<i>Danner v. Himmelfarb</i> , 858 F.2d 515 (9th Cir. 1988), cert. denied, 490 U.S. 1067 (1989).....	2, 4, 5
<i>H.J. Inc. v. Northwestern Bell Telephone Co.</i> , 492 U.S. 229 (1989).....	9
<i>Huffman v. Hains</i> , 865 F.2d 920 (7th Cir. 1989).....	4
<i>Knuth v. Erie-Crawford Dairy Cooperative Association</i> , 395 F.2d 420 (3d Cir. 1968)	4
<i>L.A. Draper & Son v. Wheelabrator-Frye, Inc.</i> , 735 F.2d 414 (11th Cir. 1984).....	3
<i>La Buhn v. Bulkmatic Transport Co.</i> , 865 F.2d 119 (7th Cir. 1988).....	3
<i>Lovell Mfg. v. Export-Import Bank of U.S.</i> , 843 F.2d 725 (3d Cir. 1988)	2, 4
<i>Moor v. County of Alameda</i> , 411 U.S. 693 (1973)	5, 7
<i>Newman v. Burgin</i> , 930 F.2d 955 (1st Cir. 1991).....	3

TABLE OF AUTHORITIES – Continued

	Page
<i>Newport Limited v. Sears, Roebuck & Co.</i> , 739 F. Supp. 1078 (E.D. La. 1990).....	6
<i>O'Brien v. Continental Ill. Natl. Bank and Trust Co.</i> , 593 F.2d 54 (7th Cir. 1979).....	3
<i>Piper Aircraft Co. v. Reyno</i> , 450 U.S. 909 (1981).....	7
<i>Rice v. Branigar Organization, Inc.</i> , 922 F.2d 788 (11th Cir. 1991).....	2
<i>Schneider v. TRW, Inc.</i> , 938 F.2d 986 (9th Cir. 1991)	3
<i>Smith v. Cooper/T. Smith Corp.</i> , 850 F.2d 1086 (5th Cir. 1988)	9
<i>Sparks v. Hershey</i> , 661 F.2d 30 (3d Cir. 1981).....	4
<i>Super Valu Stores, Inc. v. Peterson</i> , 506 So. 2d 317 (Ala. 1987)	6
<i>United Mine Workers v. Gibbs</i> , 388 U.S. 715 (1966)	3

MISCELLANEOUS:

Note, "The New Business Rule and the Denial of Lost Profits: Men Keep Their Promises When Neither Side Can Get Anything by the Breaking of Them", 48 <i>Ohio St. L. J.</i> 855 (1987).....	5
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PETITIONER'S REPLY BRIEF

Newport Limited, A Partnership in Commendam ("Newport") submits this reply brief to respond to certain arguments raised by Sears, Roebuck and Co. ("Sears") in its Brief of Respondent In Opposition To Petition For a Writ of Certiorari ("Sears' Opposition Brief").

ARGUMENT

A. There Is a Conflict Among the Circuits

It is difficult to fathom Sears' assertion that the Fifth Circuit's decision does not conflict with decisions of the

other circuits. For example, the Ninth Circuit found that "the proper exercise of discretion *requires* the dismissal of state claims" once the federal claim has been dismissed on summary judgment, even after substantial litigation. *Berg v. First State Ins. Co.*, 915 F.2d 460, 468 (9th Cir. 1990) (emphasis supplied); *see also Rice v. Branigar Organization, Inc.*, 922 F.2d 788, 792 (11th Cir. 1991) ("district court can abuse its discretion under these circumstances *only* by dismissing the pendent claims when no state forum is available") (emphasis added); *Danner v. Himmelfarb*, 858 F.2d 515, 524 (9th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989) ("[although] in some of our cases we have said that because of lengthy pretrial proceedings, it was not an abuse of discretion to retain jurisdiction over state claims after the federal claim has been dismissed . . . [t]hese cases . . . do not hold that the district court *must* exercise jurisdiction over pendent state claims whenever there have been lengthy pretrial proceedings") (emphasis added; citations omitted); *Lovell Mfg. v. Export-Import Bank of U.S.*, 843 F.2d 725, 735 (3d Cir. 1988) ("absent 'extraordinary circumstances,' a district court in this circuit is powerless to hear claims lacking an independent jurisdictional basis, and 'time already invested in litigating the state cause of action is an insufficient reason to sustain the exercise of pendent jurisdiction' ") (citation omitted). A conflict exists, and the grant of certiorari is necessary to provide uniformity among the circuits.

No other appellate court has found that judicial economy alone is enough to reverse a district court's decision declining jurisdiction over purely state law claims. Only in instances when the claim would be time barred in state court has any appellate court held that a district court

must exercise its jurisdiction. See, e.g., *Cooley v. Pennsylvania Housing Finance Agency*, 830 F.2d 469 (3d Cir. 1987); *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414 (11th Cir. 1984); *O'Brien v. Continental Ill. Natl. Bank and Trust Co.*, 593 F.2d 54 (7th Cir. 1979). Nonetheless, even under those circumstances, if the district court is uncertain whether the claim may be time barred, dismissal is not an abuse of discretion. *Newman v. Burgin*, 930 F.2d 955, 965 (1st Cir. 1991).

Those other circuits adhere to the principle of *United Mine Workers v. Gibbs*, 382 U.S. 715 (1966). The black letter rule in *Gibbs* is that, when a district court dismisses all the federal claims before trial, it *should* also dismiss the pendent state law claims. *Id.* at 726. Only under limited circumstances is dismissal of pendent claims not required. For example, if judicial economy would be served, then the court *may* retain jurisdiction over the state law claim. See, e.g., *Schneider v. TRW, Inc.*, 938 F.2d 986 (9th Cir. 1991). Such cases stand for the proposition that a district court will not be reversed on appeal if it retains the state law claims because of such extenuating circumstances; however, that proposition is a far cry from stating that a district court *must* retain jurisdiction solely on the ground of judicial economy. See, e.g., *La Buhn v. Bulkmatic Transport Co.*, 865 F.2d 119, 123 (7th Cir. 1988) ("This is not a case like *Graf* where the correctness of the defense was clear at a glance, so that refusing to decide it in federal court was merely postponing the inevitable. Even in that case we did not suggest that the district judge was *obliged* to retain jurisdiction - we merely upheld his decision to do so") (emphasis in original).

Sears cites several cases which purportedly provide that a district court abuses its discretion when it dismisses pendent state law claims if the federal claim is dismissed before trial. Not one of those cases is on point. In *Caserta v. Village of Dickinson*, 672 F.2d 431 (5th Cir. 1982), the court wrongfully dismissed the state claims *after a trial*. In *Knuth v. Erie-Crawford Dairy Cooperative Association*, 395 F.2d 420 (3d Cir. 1968), the appellate court revived the dismissed federal claim and therefore also revived the state law claims. Similarly, in *Brown v. Knox*, 547 F.2d 900 (5th Cir.), *cert. denied*, 432 U.S. 906 (1977), and *Sparks v. Hershey*, 661 F.2d 30 (3d Cir. 1981), although the district courts abused their discretion by declining to exercise jurisdiction, the federal claims were viable and had not been dismissed, and the state claims arose from the same nuclei of operative facts.

Here, in finding an abuse of discretion, the Fifth Circuit did nothing more than simply substitute its judgment for that of the district court. Other circuits, by contrast, afford the highest degree of deference to a district court's *relinquishment* of jurisdiction. As the Seventh Circuit declared: "[T]he district court's discretion to *relinquish* pendent jurisdiction [is] 'almost unreviewable'" *Huffman v. Hains*, 865 F.2d 920, 923 (7th Cir. 1989) (emphasis in original); *see also Danner v. Himmelfarb*, 858 F.2d 515 (9th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989) and *Lovell Mfg. v. Export-Import Bank of U.S.*, 843 F.2d 725 (3d Cir. 1988). The rule in other circuits is – and in every circuit should be – that a district court can abuse its discretion when it declines to exercise pendent jurisdiction after dismissing the federal claims only if no state forum is available to the plaintiff.

B. Novel Issues of State Law Exist and Comity Requires that State Courts Adjudicate Those Issues

This Court has expressly held that a district court may refuse to exercise pendent jurisdiction if, among other things, that court would have "to resolve difficult questions of [state] law upon which state court decisions are not legion." *Moor v. County of Alameda*, 411 U.S. 693, 715-16 (1973) (citation omitted). Sears argues that the district court in this case need not decide any novel issue of state law and that the Fifth Circuit's decision therefore does not undermine the principle of comity. Sears is mistaken.

First, comity is served whenever a state court is allowed to preside over state law claims, whether or not the state law claims raise novel issues. *See, e.g., Danner v. Himmelfarb*, 858 F.2d 515, 524 (9th Cir. 1988), cert. denied, 490 U.S. 1067 (1989) ("[Plaintiff] does not dispute, nor could he, that principles of comity will be well-served by allowing the state courts to resolve claims solely of state law.").

Second, this case does involve novel issues of state law. Newport, for example, has asserted a claim for lost profits for a new business that lacks a history of operations. Many jurisdictions bar such claims under the "new business" rule. According to this rule, a business with no history of profitable operations cannot, as a matter of law, prove lost profits with reasonable certainty. *See, e.g., Note, "The New Business Rule and the Denial of Lost Profits: Men Keep Their Promises When Neither Side Can Get Anything by the Breaking of Them,"* 48 *Ohio St. L. J.* 855 (1987). Sears contends that Louisiana law is to the same effect. Newport believes that Louisiana will follow

the emerging majority view that rejects the new business rule, "particularly where the defendant itself has wrongfully prevented the business from coming into existence and generating a track record of profits." *Super Valu Stores, Inc. v. Peterson*, 506 So. 2d 317, 330 (Ala. 1987). Because Newport's claim for lost profits is approximately \$40 million, the issue has been hotly contested.¹ The issue raises concerns critical to many commercial disputes in Louisiana, is purely one of state law, and should be adjudicated in state court.

Sears' reliance on *Brill v. Catfish Shaks of America, Inc.*, 727 F. Supp. 1035 (E.D. La. 1989), illustrates why the Fifth Circuit erred and why a "surer-footed reading of applicable law" in state court is important. The dispute in *Brill*, like the dispute here, concerned the breach of an implied covenant of good faith and fair dealing under the Louisiana Civil Code. The court's jurisdiction was based on diversity of citizenship and, thus, the court was *required* to decide what it considered a difficult and unsettled question of state law:

The term "good faith" is not defined in the Civil Code articles on obligations. Louisiana courts provide little guidance as to when conduct in the contractual setting violates the implied covenant of good faith.

¹ Although Sears quotes extensively from the district court's comments regarding Newport's claims for damages, Sears fails to advise the Court that those comments focused on RICO damages and, more specifically, on RICO "injury", not on damages for lost profits under Louisiana law. *Newport Limited v. Sears, Roebuck & Co.*, 739 F. Supp. 1078, 1082 (E.D. La. 1990).

Id. at 1040. The district court in *Brill* had to decide an unsettled issue of state law because it had no choice but to make such a determination. Under this Court's decision in *Moor*, however, no district court should be forced to make such a determination when no independent ground for jurisdiction exists.

C. Newport's Decision to Proceed in State Court Is Entitled to Deference

In general, great deference should be given to a plaintiff's choice of forum. *Piper Aircraft Co. v. Reyno*, 450 U.S. 909 (1981). Sears nonetheless accuses Newport of "seeking to enlist the aid of the Court in furtherance of Newport's forum shopping and recently-acquired preference to have a state court decide its claims." Sears' Opposition Brief at 2. This accusation lacks merit.² If *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), had been decided prior to the institution of this lawsuit, Newport would have filed in state court. At the time Newport brought this suit, however, diversity jurisdiction existed under the controlling law of the Fifth Circuit. Thus, had Newport filed in state court, Sears would have removed the case to federal court. By initially filing in federal court, Newport sought to save time, money, and judicial resources by avoiding the unnecessary complication of Sears removing the case. Sears also wholly ignores Newport's legitimate

² In its brief, Sears alleges that counsel for Newport characterized the district court as a "hostile forum" during oral argument. Sears' Opposition Brief at 9. No such statement was made.

desire to have its state law claims given a "surer-footed reading under" by a state court.

D. Sears Mischaracterizes the State Court Discovery

Sears tries to discredit Newport's assertion that there will be no duplicative discovery in state court. Sears claims that, because the state court did not accept all discovery orders made by the federal court, Newport will now engage in redundant discovery. Sears neglects to mention that, apart from a limited set of discovery requests, the only discovery Newport has sought to take in the state court proceeding has been videotaped depositions of certain key officers and agents of Sears that Sears refuses to make available at trial and that are beyond the subpoena power of the court. To imply that these video depositions are duplicative or improper is misleading given that the depositions would be unnecessary but for Sears' refusal to make the witnesses available at trial. Newport is otherwise ready to proceed to trial and has requested an early trial date from the state court.³

³ Sears also misleads this Court by insinuating that Newport did not immediately institute state court proceedings because Newport did not serve Sears for four months. Sears Opposition Brief at 3. Newport instituted the state action within two weeks of the federal court's dismissal. While Newport did not serve Sears until September 5, 1990, such service was unnecessary and pointless – Sears *removed* the state court action two weeks after it was brought. That removal, of course, was frivolous. The federal district court properly sanctioned Sears and remanded the proceeding to state court.

E. The Duration of Federal Jurisdiction Is Not Significant

Sears attempts to buttress its argument that the district court improperly relinquished jurisdiction by stressing the length of federal proceedings.⁴ Not counting the year that the stay was in effect, however, the federal court had jurisdiction under *Carden* for no more than five months. For the first two years, jurisdiction was founded solely on diversity of citizenship. In November 1988, Newport amended its complaint to add a claim under RICO. Within five months, because of the unsettled state of RICO law, the district court stayed *all* proceedings pending resolution of the issues in *Smith v. Cooper/T. Smith Corp.*, 850 F.2d 1086 (5th Cir. 1988), which was held in abeyance pending a decision by this Court in *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Before the stay here was lifted, this Court decided *Carden*, and, then, what had been the basis for diversity jurisdiction ceased to exist. Shortly thereafter, the district court dismissed the RICO claim. The pendent claims were dismissed at the same time, after the entire case had lain dormant in the trial court for more than a year. Consequently, although the case may have been before the district court for several years, the court had proper jurisdiction over active litigation for only a few months.

⁴ Sears attempts to dissuade the Court from granting Newport's petition by suggesting that the Fifth Circuit's decision is fact driven. Assuming, *arguendo*, the facts as stated by Sears, the Fifth Circuit's decision is legally unsupportable. A district court should not be forced to retain pendent jurisdiction after all federal claims are dismissed prior to trial, unless no state forum is available.

CONCLUSION

Grounding its decision solely on judicial economy, the Fifth Circuit has ruled that the district court cannot relinquish jurisdiction over state law claims even though all federal claims have been dismissed. No other appellate court has so held and, in fact, other circuits require a district court to relinquish jurisdiction under such circumstances. The Fifth Circuit's decision constitutes an unwarranted and improper attack on the adjudicatory power of state courts.

Respectfully submitted,

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